85-927

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Amir Shokrian,

Petitioner,

vs.

Midge Carroll,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DON ERIK FRANZEN, ESQ.
RUBIN, EAGAN & FEDER
A Professional Corporation
8383 Wilshire Blvd., #950
Beverly Hills, CA 90211
(213) 651-1200
Attorneys for Petitioner
Counsel of Record

QUESTIONS PRESENTED

Whether Petitioner's right to effective assistance of counsel was denied in a probation violation hearing where his attorney failed to interview witnesses, failed to obtain discovery and to investigate facts of the probation violation, failed to file a motion to disqualify the judge for bias, failed to object to inaccurate translation of witness testimony, failed to adequately cross-examine witnesses, and failed to present material defenses.

Whether petitioner was deprived of due process as guaranted under the Fourteenth Amendment to the Constitution of the United States where the probation violation hearing violated his right to

adequate counsel, where an inadequate interpretation of a foreign language took place during the course of the hearing, and the trier of fact was not impartial and unbiased?

PARTIES TO THE PROCEEDING

There are no parties to this proceeding in addition to those set forth in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

OPINIONS BELOW 5

JURISDICTION 5

CONSTITUTIONAL PROVISIONS INVOLVED 6

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 15

APPENDIX

TABLE OF AUTHORITIES

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967) 17

Lujian v. United States, 207 F. 2d 190 (10th Cir. 1953) 19

Strickland v. Washington, ____, U.S. ____, 104 S. Ct. 2052 (1984) 16, 17, 18, 23,

Tumey v. Ohio, 273 U.S. 510, 523 (1927) 21

STATUTES

Title 28 USC Section 1254 (1) 5

Section 653 (f) of the California Penal Code 8

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Amir Shokrian,	)
	)
Petitioner,	)
	)
vs.	)
	)
Midge Carroll,	)
	)
Respondent.	)
	)
	)

PETITION FOR WRIT OF CERTIORARI TO THE COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Amir Shokrian, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of

the United States District Court, Central District of California, dismissing Petitioner's Writ of Habeas Corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. The Memorandum Decision was filed on September 27, 1985.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC Section 1254(1) on the ground that he is a party to a civil case, for which review by way of Certiorari is authorized.

The United States Court of Appeals for the Ninth Circuit filed its opinion on September 27, 1985, and the instant Petition for Writ

of Certiorari is filed within sixty days of that decision.

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."

Amendment VI

". . . nor shall any state deprive any person of life, liberty of property, without due process of law; . . ."

Amendment XIV, Section 1.

STATEMENT OF THE CASE

Petitioner entered a plea of nolo contendere in the Los Angeles County Court, State of California, to a charge of solicitation to commit murder. He was sentenced to 90 days in jail followed by 3 years and 9 months probation. Later,

the court revoked his probation and sentenced him to 4 years imprisonment. This Writ arises from Petitioner's challenge to the constitutionality of his probation violation hearing.

Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California. In that Petition, Petitioner contended that he was denied effective assistance of counsel during his probation revocation and sentencing hearings, and that his right to due process in these hearings was violated.

The District Court dismissed the Petition. Review was sought in the 9th Circuit Court of Appeals, and the Court of Appeals affirmed the District Court.

The facts pertinent to this Petition may be summarized as follows. On December 1, 1980, in the Los Angeles County Court, Petitioner was charged with solicition to commit murder, in violation of Section 653(f) of the California Penal Code. The complaint named Itzhak Shabtai, petitioner's brother-in-law as the intended victim. The complaint followed intense discord between the Shokrian and Shabtai families which resulted from petitioner's estrangement from his wife.

On April 8, 1981, Petitioner entered a plea of nolo contendere.[1]

/1. The validity of this plea is the subject of a separate Petition for Writ of Habeas Corpus, for which review has also been sought in the United States Court of Appeals in Case of Shokrian vs.

Petitioner was thereafter sentenced on November 17, 1981, to 90 days in the California State Prison, and 4 years probation, by the Honorable Julius A. Leetham.

Petitioner's probation went uneventfully until February 23, 1983, when Shabtai appeared in the courtroom of the sentencing Judge, and on an ex parte basis stated to the court that petitioner had uttered threats or curses and that he wished petitioner to be warned. Neither petitioner nor petitioner's attorney had notice of this ex parte appearance. Mr. Shabtai was sworn as a witness by the court, and interrogated by the court

---

Midge Carroll, CA 84-6260. The issues embraced in that case are not before this court on this Petition.

outside the presence of petitioner or his counsel, and without their knowledge. At the conclusion of this hearing, the court ordered a probation violation hearing to be held on March 23, 1983.

A hearing on probation violation was held on that date before the Honorable Julius A. Leetham, the sentencing Judge. Several of the witnesses called by the people testified in Persian (or Farsi) through an interpreter. The court found petitioner to be in violation of probation for having issued and uttered threats. The court ordered petitioner's probation revoked, and sentenced him to the mid-term of 4 years in state prison.

The evidence presented by petitioner in the form of verified

pleadings or affidavits, and included in the record on appeal in this matter, shows that petitioner's trial counsel failed to conduct an investigation that would be expected of a reasonably competent attorney, and failed to raise important defenses on petitioner's behalf. The evidence offered by petitioner shows:

1. Petitioner's trial counsel never prepared Shokrian for his testimony at the time of the probation hearing, and trial counsel never interviewed Shokrian's witnesses or prepared them for testifying in advance of the hearing;

2. Shokrian's trial counsel was advised both by Shokrian and one of his brothers that the translation being made by the interpreter at

the hearing was inaccurate, but trial counsel failed to make any objection or to call it to the court's attention.

3. The inaccuracy of the translation was of crucial importance, in that some of the statements allegedly made by Shokrian were not threats, but represenated idioms of the Persian language which are understood by Persians to be in the nature of curses or abusive language rather than threats. Petitioner's trial counsel failed to raise this defense and did not even investigate the possibility of this defense;

4. Petitioner's trial counsel failed to obtain a transcript of Shabtai's ex parte appearance before the court, and in fact was ignorant of his appearance until the matter

was brought to his attention by the court during the course of the probation violation hearing. As a result, trial counsel was deprived of evidence that would have impeached Shabtai's credibility at the probation violation hearing. While Shabtai testified on February 23 that Shokrian was "very careful with his words", Reporter's Transcript, hearing February 23, 1983; Exhibit "C" to Petition (hereinafter "R.T.F."), p. 8, l. 27, his testimony at the probation violation hearing was strongly to the effect that Shokrian allegedly uttered numerous threats. Reporter's Transcript, hearing March 23, 1983; Exhibit E to Petition, (hereinafter "R.T.M"), pp. 47-48.

Moreover, the record shows

that the Judge took an active and aggressive role in questioning Mr. Shabtai at the time of the ex parte appearance. The reporter's transcript shows the Judge interrogating Mr. Shabtai with the following questions:

"But all I want to know is has there been a threat made against you by the defendant in this case?

"Well is he threatening you?" R.T.F. p. 8, ll. 16.

"What does he say when he talks to you?" R.T.F. p. 18, ll. 20.

"Doe he say anything other than cursing you, that is does he say he is going to do you some harm or your wife or your children some harm?" R.T.F. p. 8, ll. 24-26.

"You can hear his voice and you know it's your brother-in-law's,

is that right?" R.T.F. p. 9, ll. 12-13.

The record also shows that the information obtained by the court from Shabtai as a result of this ex parte hearing influenced his perception of the case. Before hearing any evidence at the probation violation hearing, the court made the following statements to the parties and counsel present:

"I indicate there will be a resolution. I shall not permit this kind of activity . . . now let this be perfectly clear that there will be a resolution; and I shall not permit in our society something like this which I think is a disgrace to the system of justice. It may be alright in Iran, and places of that nature, but there is no reason

that the public should be faced with this kind of situation." R.T.M. p. 2, ll. 8-9, 18-23.

REASONS FOR GRANTING THE WRIT

The record in this matter demonstrates that petitioner's rights under the Sixth Amendment to the Constitution of the United States, guaranteeing him effective assistance of counsel, and under the due process clause to the Fourteenth Amendment of the Constitution of the United States, were denied. Certiorari should be granted on the first ground to provide clarification and guideness of this court's holding in Strickland v. Washington, ___, U.S. ___, 104 S. Ct. 2052 (1984), and on the second ground because the combination of errors and improprieties in connection

with this probation violation amount to a violation of his right to due process of law, which in their totality was not harmless beyond reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967).

In Strickland vs. Washington, supra, this court stated that:

"[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

In this case, the ineffectiveness of petitioner's trial counsel, coupled with other violations of his constitutional rights, creates

a situation in which the process of the state court cannot be relied upon from a constitutional stand point. As this court makes clear in its holding in Strickland, the standard of ineffective assistance of counsel ultimately involves a determination of whether due process was undermined. Here, the petitioner was the subject of a combination of factors which together resulted in his being denied a fair hearing. These factors are:

A. Right to Counsel.

As discussed at length in the Statement of the Case section of this Petition, petitioner was effectively denied adequate representation by his counsel, who failed to conduct an adequate investigation, raise material

defenses, and interview witnesses, prior to the probation violation hearing.

B. Inaccurate Interpreter.

A defendant has a right to an unbiased interpreter as well as to an unbiased interpretation. "A disinterested interpreter is essential to an impartial interpretation of the witnesses' testimony." Lujian v. United States, 207 F. 2d 190 (10th Cir. 1953).

In this case, the language to be interpreted is actually the offense with which the petitioner was charged, namely issuing and uttering threats. Yet in this case, as is recited in the statement, supra, translation given by the interpreter failed to take into account crucial aspects of the

Persian language, culture and psychology, all of which tended to give a false impression to the trier of fact as to the gravity of the statements in fact being made. Moreover, petitioner's declarations establish that the translation made by the interpreter of common Persian expressions were such as to make the alleged "threats" of the petitioner sound far worse in translation then they mean in the original language. Without an independent interpreter for the petitioner, the trier of fact was necessarily misled by the translation. Where the words allegedly stated constitute the offense charged, no more vital blow to fair adjudication can be imagined than an inaccurate translation.

C. Impartial and Unbiased Trier of Fact.

A fair trial necessarily implies a trial before an impartial judge. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

In the instant case, it was clearly improper for the court to undertake an ex parte interrogation of Shabtai on February 23, 1983, out of the presence of the petitioner and without notice to him or his counsel. The discussion between the Court and Mr. Shabtai was more than one in which the court acted as a passive recipient of evidence. The Court undertook an active examination of Mr. Shabtai, and inquired repeatedly whether in fact threats had been uttered by petitioner.

The tenor of the Court's discussion at the opening of the probation violation hearing, quoted in part supra, p. 15, suggests most strongly that the statements made by Mr. Shabtai to the Court on February 23 influenced greatly the Court's perception of the case. The record suggest strongly that the initial impression created at the ex parte hearing, namely one of the guilt of petitioner of a violation of his probation, was an impression which never left the mind of the trier of fact throughout the proceedings.

This court's teaching in Strickland requires a court on review to determine whether the "proper functioning of the adversarial process" has been so undermined that

the trial cannot be "relied on as having produced a just result." The number of irregularities in this proceeding does render the probation violation hearing subject to constitutional doubt for failure to comply with the fundamental standards of due process. Certiorari should be granted to allow the Court to set the contours of its holding in Strickland in cases such as this, where a claim of ineffective counsel in coupled with a challenge to the propriety of the hearing itself.

/////

/////

/////

/////

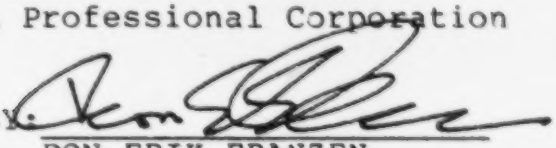
/////

/////

WHEREFORE, Petitioner requests that Writ of Certiorari be granted as herein prayed for.

DATED: November 26, 1985

DON ERIK FRANZEN, ESQ.
RUBIN, EAGAN & FEDER
A Professional Corporation

BY: 
DON ERIK FRANZEN
Attorneys for Petitioner

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Amir Shokrian,	)
	)
Petitioner,	)
	)
vs.	)
	)
Midge Carroll,	)
	)
Respondent.	)
	)
	)

APPENDIX TO PETITION

FINDINGS ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY, Page 1.

ORDER, Page 9.

JUDGMENT, Page 11.

MEMORANDUM, Page 12.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN, Petitioner, v. MIDGE CARROLL, et al., Respondent(s).	CASE NO. CV 84-3032-PAR(K) FINDINGS ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

On April 27, 1985, petitioner, by counsel, filed this petition for a writ of habeas corpus, paying the filing fee. The Magistrate called for a response which was filed on May 29th. Petitioner filed a traverse on

June 19th and the Magistrate called for a further response which was filed on August 20th. No traverse was filed but a request was made for an evidentiary hearing on behalf of petitioner.

The Magistrate has read and consider the pleadings as well as the exhibits submitted and makes the following findings.

Petitioner originally pled nolo contendre to a felony in the Superior Court of the State of California for the County of Los Angeles. He was placed on four years probation. On March 23, 1983, his probation was revoked and he was sentenced to state prison for a term of four years. Subsequently, petitions for writs of habeas corpus attacking the revocation and sentence were denied by the

appellate and Supreme Courts of the State of California.

The instant petition was then filed. Respondent argues that because petitioner was still litigating his original conviction in the courts of the State of California (see CV 84-1574-DWW(Mc)) the instant matter should not be considered by this Court. (Suppl. Ans. Exh. 1.) The Magistrate finds otherwise. Finetti v. Harris, 609 F.2d 594 (2nd Cir. 1979). A further response was called for.

Regarding his probation revocation, petitioner alleges that he "suffers from illegal restraint because he was deprived of his constitutional right to effective assistance of counsel." He alleges that his counsel failed to interview

petitioner and possible witnesses, failed to investigate the facts of the alleged probation violation and failed to present a defense to the charge made therein prior to and at petitioner's violation hearing. It is further alleged that petitioner's counsel failed to challenge the sentencing judge for cause because said judge had taken testimony out of the presence of petitioner, failed to cross-examine a witness properly and failed to object to an interpreter's translation. Finally, it is alleged that the sentencing procedure did not comply with the requirements of due process.

Respondent points out that on January 30, 1984, the California Court of Appeal affirmed petitioner's judgment of conviction and the

revocation of his probation but remanded the matter for resentencing. On July 6, 1984, on remand, petitioner was afforded another sentencing hearing in the Los Angeles County Superior Court based on the probation revocation which is the subject of this petition. He was again sentenced to the same four year term in state prison.

The sentencing issue at the first hearing is moot.

The Magistrate has reviewed the transcript of petitioner's second sentencing on July 6, 1984 which was lodged with the Court by respondent. It is apparent that the issues now sought to be raised by petitioner were raised again at the time of his sentencing and they had no effect on the sentencing judge who had

originally revoked probation. There is no evidence that petitioner's presentation was in any way curtailed by the court. Evidence was taken. Those matters which led to the revocation of the petitioner's probation were relevant on the issue of culpability and were heard and considered at the time of sentencing. It is apparent from the court's decision in pronouncing the same sentence that whatever may have been the shortcomings of petitioner's counsel at the prior revocation, they had no prejudicial effect on the ultimate outcome of petitioner's case. There was no constitutional deprivation. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978). Strickland v. Washington, ____ U.S. ____, 80 L.Ed.2d 674 (1984).

In this connection it should be noted that petitioner's allegation that the trial court improperly heard ex parte testimony prior to his probation revocation hearing has no merit. The record indicates that prior to the revocation hearing while petitioner was still at liberty, a witness, the alleged victim of the offense, appeared in court at a time when petitioner was present without counsel, indicating that he wished to be heard regarding a violation of petitioner's probation. The court then set the matter for a hearing. At the hearing, the alleged victim repeated his allegations that petitioner had threatened him and was subject to cross-examination.

Petitioner is currently incarcerated because he was sentenced

on the original offense. The issue of the violation of his probation is moot. He has had ample opportunity at his new sentence hearing to correct any alleged previous error and to demonstrate prejudice.

IT IS THEREFORE RECOMMENDED that the Court enter an Order dismissing the petition.

DATED: This 12th day of October, 1984.

JOHN R. KRONENBERG
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN,	) CASE NO.
	) CV 84-3032-PAR(K)
Petitioner,	)
	) ORDER
v.	)
	)
MIDGE CARROLL, et al.,	)
	)
Respondent(s).	)
	)

Pursuant to 28 U.S.C. section 636, the Court has reviewed the record, the pleadings, the findings of the United States Magistrate, and the objections and concurs with and adopts those findings.

Each party will bear its own costs.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of the Judgment, of this Order and of the findings of the United States Magistrate by United States mail upon counsel of record for both parties.

DATED: This 12th day of October, 1984.

PAMELA A. RYMER
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN,	) CASE NO.
	) CV 84-3032-PAR(K)
Petitioner,	)
	) JUDGMENT
v.	)
	)
MIDGE CARROLL, et al.,	)
	)
Respondent(s).	)
	)

IT IS ADJUDGED that the petition is dismissed.

DATED: This 12th day of October, 1984.

PAMELA A. RYMER
United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMIR SHOKRIAN, Plaintiff-Appellant, v. MIDGE CARROLL and ATTORNEY GENERAL CALIFORNIA, Defendants-Appellees.	)	CA No. 84-6260 DC No. CV 84-1574-DWW MEMORANDUM*
AMIR SHOKRIAN, Plaintiff-Appellant, v. MIDGE CARROLL, Defendant-Appellee.	)	CA No. 84-6599 DC No. CV 84-3032-PAR

Appeal from the United States District Court for the Central District of California

Hon. David W. Williams, District Judge, Presiding (#84-6260)

Hon. Pamela A. Rymer, District Judge, Presiding (#84-6599)

Argued and submitted August 6, 1985 at Pasadena, California

Before: SKOPIL and CANBY, Circuit Judges, and SOLOMON,** District Judge.

Amir Shokrian (appellant) entered a plea of nolo contendere in the Los Angeles County Court to a charge of solicitation to commit murder. He was sentenced to ninety days in jail followed by three years and nine months probation. Later, the court revoked his probation and sentenced him to four years imprisonment.

Appellant filed two separate petitions for writ of habeas corpus in the United States District Court for the Central District of California.

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21

**The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

In the first petition, appellant contended that his plea of nolo contendere in a state court proceeding was invalid because there was an inadequate factual basis to justify the court's acceptance of the plea. In the second petition, appellant contended that he was denied effective assistance of counsel during his probation revocation and sentencing hearings.

The district court dismissed both petitions. We affirm.

Facts

On December 1, 1980, in the Los Angeles County Court, appellant was charged with solicitation to commit murder, in violation of section 653f of the California Penal Code. The complaint named Itzhak Shabtai, appellant's brother-in-law, as the

intended victim. The complaint followed intense discord between the Shokrian and Shabtai families which resulted from appellant's estrangement from his wife.

On April 8, 1981, appellant, after he waived preliminary hearing, entered a plea of nolo contendere. During the plea hearing, the prosecutor informed appellant of his constitutional rights to a trial. Appellant waived those rights. The prosecutor then asked appellant if his plea was made freely and voluntarily, and appellant answered "Yes."

Then the following exchange took place:

Prosecutor: Now, in order to prove this case, the People would have to prove beyond a reasonable doubt that you solicited someone to commit murder, to kill Itzhak Shabtai, that you had the specific intent that Mr. Shabtai - in other words, solicitation

coupled with specific intent to see that he was killed.

Now, knowing that, do you wish to contest these charges against you?

Appellant: Well, I don't think that is --

Defense Counsel: Just a moment.

The Court: I think that the record should reflect, and the Court will make a finding, that Mr. Shokrian understands the charge in this case and understands that his plea of no contest means that he is not contesting the charge.

Prosecutor: I am explaining the elements of the charge.

The People would have to prove that there was a solicitation to kill Mr. Shabtai and that you had the specific intent that he be murdered.

Now, knowing the elements of the crime, do you wish to contest the elements?

Appellant: I do not wish to contest the elements.

The prosecutor and defense counsel then stipulated that there was a factual basis for appellant's plea of nolo contendere.

Section 1192.5 of the California Penal Code requires that before the court accepts a plea of guilty or nolo contendere, the court must satisfy itself that there is a factual basis for the plea. In accordance with that requirement, the court stated that it found appellant's waivers to be knowingly and voluntarily made, that there was a factual basis for the plea, and that appellant entered the plea freely. The court then accepted the plea.

On November 17, 1981, after a sentencing hearing at which appellant was represented by counsel, the court placed appellant on probation for four years on the condition that he spend ninety days in jail.

On February 23, 1983, Shabtai appeared before the court ex parte and

complained that appellant had uttered curses to him in Persian, their native language.

On March 23, 1983, the court held a probation revocation hearing and found that appellant had violated the terms of probation because he threatened Shabtai. The court revoked appellant's probation and sentenced him to four years in prison. Appellant was represented by counsel in these proceedings.

On May 10, 1983, appellant appealed from the order revoking his probation. In the California Court of Appeal, he asserted that the trial court abused its discretion when it revoked his probation and that he was denied effective assistance of counsel at the probation revocation hearing.

On October 11, 1983, appellant

filed a petition for writ of habeas corpus in the California Court of Appeal in which he asserted (1) that the lack of effective counsel violated his right to due process, (2) that Shabtai's ex parte appearance biased the proceedings, and (3) that the testimony of two prosecution witnesses who spoke in Persian was not accurately translated.

On January 30, 1984, the California Court of Appeal affirmed the order revoking probation and denied appellant's petition for writ of habeas corpus, but the appellate court remanded the case to the trial court to resentence appellant because the court made inappropriate comments at the beginning of the sentencing hearing.

Appellant did not move to withdraw

his original plea of nolo contendere either before or after his sentence, and he did not file a direct appeal. Nevertheless, on November 14, 1983, and prior to the California Court of Appeal's opinion, appellant filed a second habeas petition in that court in which he challenged the validity of his original plea.

An appellant may not appeal from a conviction on a plea of guilty or nolo contendere unless the trial court executes and files a certificate of probable cause. Cal. Penal Code section 1237.5.

On December 22, 1983, the California Court of Appeal denied the second habeas petition. On the same day, appellant petitioned the California Supreme Court for a "Hearing on Writ of Habeas Corpus"

regarding the validity of his original plea. On January 26, 1984, the California Supreme Court denied the petition.

On February 9, 1984, appellant petitioned the California Supreme Court for a hearing on the first habeas petition, which the California Court of Appeal denied on January 30, 1984. On March 14, 1984, the California Supreme court denied this petition.

On March 9, 1984, appellant filed a federal habeas petition in the United States District Court in which he challenged the validity of his original plea of nolo contendere. One week later, he filed a second petition in which he challenged the validity of his probation revocation proceeding.

The district court denied both petitions, and it also denied appellant's petitions for certificates of probable cause. Appellant then filed two notices of appeal. Under Rule 22(b) of the Federal Rules of Appellate Procedure, we construed the notices of appeal as requests for certificates of probable cause and have granted appellant's requests to appeal.

Validity of the Plea -- No. 84-6260

In accordance with Rule 22(b), the Supreme Court holding in In Re Burwell, 350 U.S. 521 (1956), and appellant's urgent request that we consider the merits of these appeals, we have carefully analyzed the facts and arguments in each appeal.

Appellant contends that his original plea is invalid because under section 1192.5 of the California Penal Code the stipulation entered into by appellant's attorney and the prosecutor does not provide an adequate factual basis for his plea. Appellant contends that he was denied due process during the plea hearing because the state failed to comply with its own procedure which requires a factual basis for the plea.

Under People v. Watts, 67 Cal.App.3d 173, 180, 136 Cal.Rptr. 496, 500-01 (1977), the trial court may use various methods to determine that there is a factual basis for the plea. In Watts, the sole reference to a factual basis for the guilty plea was defense counsel's statement that he discussed the elements of the

charge with the defendant and advised him of the consequences of the plea. The court held that this statement considered alone did not satisfy the factual basis requirement. The court affirmed the conviction on the ground that the grand jury transript, which was part of the record, contained ample information which supplied an adequate factual basis.

The court in Watts stated that under section 1192.5, the trial court may use many kinds of evidence to satisfy itself that there is a factual basis for the plea, including statements by the defendant or his counsel, depositions, and presentence investigation reports.

We find that there was an adequate factual basis for appellant's plea. Here, the prosecutor explained the

charges to appellant in open court. He told appellant that at trial the state would have to prove that appellant solicited the murder of his brother-in-law in Los Angeles County with the intent that he be killed. Appellant stated that he did not contest the charges.

In addition to the statements made during the plea hearing, the record contains affidavits and other statements which describe in detail appellant's actions and statements relative to the solicitation of murder.

Appellant further contends that his federal due process rights were violated because his plea was not knowing and voluntary. He asserts that when his attorney interrupted him during the exchange quoted earlier, he was about to deny that he intended to

cause harm to his brother-in-law.

Appellant overlooks the fact that after the interruption, the prosecutor again described the elements of the charge:

Prosecutor: I am explaining the elements of the charge.

The People would have to prove that there was a solicitation to kill Mr. Shabtai and that you had the specific intent that he be murdered.

Now, knowing the elements of the crime, do you wish to contest the elements?

Appellant: I do not wish to contest the elements.

Appellant also stated that he made the plea of nolo contendere freely and voluntarily and that no one threatened him or caused him to enter his plea.

The record is devoid of any evidence that appellant's plea was not knowingly and voluntarily made. On the contrary, it shows that the court

and the prosecutor, with great particularity, informed the appellant of the facts on which the court accepted the plea.

Probation Revocation -- No. 84-6599

Appellant contends that he was denied effective assistance of counsel during his probation revocation and sentencing hearings of March 23, 1983 and that Shabtai's earlier ex parte appearance biased the judge. Specifically, appellant contends that his attorney failed to interview appellant and other witnesses; failed to obtain discovery and to investigate the facts of the probation violation; failed to file a motion to disqualify the judge for bias; failed to object to the inaccurate translation of witness testimony; failed to adequately cross-examine witnesses;

and failed to present the defense that in the Persian culture the use of threats is common and is equivalent to abusive language.

The transcript of the March 23 hearings shows that whatever errors appellant's attorney made, if any, did not affect the judgment and did not render his assistance ineffective. The attorney thoroughly examined and cross-examined the witnesses and ably brought out discrepancies in the testimony of some of the prosecution witnesses.

The attorney's failure to challenge the interpreter's translation and raise the cultural defense was justified and did not prejudice applicant. Only two of the five prosecution witnesses testified in Persian. The three who testified

in English, including Shabtai, stated that they believed that appellant would carry out his threats to kill Shabtai and members of Shabtai's family. These three witnesses did not indicate, as appellant contends, that his threats were mere curses.

The attorney's failure to file a motion to disqualify the judge is also justified. The judge permitted Shabtain to appear ex parte only to determine whether a probation violation hearing was necessary, and there is no evidence that the ex parte appearance biased the judge. The record shows that the judge revoked appellant's probation solely on evidence presented at the March 23 hearings.

In Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2064

(1984), the Supreme Court of the United States stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Court further stated that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id., 104 S. Ct. at 2067.

On July 6, 1984, appellant had a second sentencing hearing in accordance with the remand from the California Court of Appeal. After a hearing, he was again sentenced to four years in prison. Appellant does

not explain why the issue of the effectiveness of his counsel at the first hearing is not now moot.

In any event, appellant has not met his burden to show ineffective assistance of counsel, and his contention that the trial court improperly heard ex parte testimony has no merit. Our examination of the record shows that appellant was adequately represented and that he was afforded due process during the March 23 hearings. The district court properly denied appellant's petition for writ of habeas corpus.

The district court's orders denying both of appellant's habeas petitions are AFFIRMED.